

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of

Petition of the United Power Line Council for
a Declaratory Ruling Regarding the
Classification of Broadband Over Power Line
Internet Access Service as an Information
Service

WC Docket No. 06-10

To: The Commission

JOINT CABLE OPERATOR REPLY COMMENTS

**FLORIDA CABLE & TELECOMMUNICATIONS ASSOCIATION
CABLE TELEVISION ASSOCIATION OF GEORGIA
CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE,
AND THE DISTRICT OF COLUMBIA
CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
SOUTH CAROLINA CABLE TELEVISION ASSOCIATION
ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION**

The above parties ("Joint Cable Operators" or "Joint Commenters") submit these comments in reply to comments filed in this proceeding by the Pennsylvania Public Utilities Commission ("PaPUC"), NextG Networks, Inc. ("NextG"), Virtual Hipster Corporation ("Virtual Hipster") and the United Power Line Council ("UPLC"). In their initial comments, the Joint Cable Operators' asked the FCC only to clarify that the term "capacity" in Section 224(f)(2) and 1.1403(a) of the Commission's rules means *all* pole capacity available to a utility, whether installed in the distribution chain or available from inventory, or through reasonable make-ready construction by way of pole change-outs and line rearrangements. Grant of the Joint Cable Operators' request will not slow BPL deployment or impose additional costs on utilities,

whether or not they are providing BPL, as all costs associated with rearranging lines on a pole and installing a new pole to accommodate new attachments are already borne by attaching parties. Furthermore, grant of this request is in the public interest as it will protect consumers' rights to choose competitive cable broadband services by ensuring cable operators continue to have non-discriminatory access to distribution poles.

In its comments, the PaPUC emphasized the importance of ensuring that competing communications service providers continue to have access to the essential facilities of BPL providers.¹ Furthermore, the PaPUC argued that the FCC should give "extensive consideration to allegations about market power and access to critical facilities" before classifying BPL as an information service.² As the Joint Commenters stressed initially, the Commission must address access to essential facilities in conjunction with any classification of BPL as an information service. Monopolistic abuse of electric pole distribution facilities has been well documented.³ The history leading up to the Pole Attachments Act, cases that followed at the Commission and in the courts, and current cases show that anticompetitive abuses will only intensify following BPL deployment. As the Supreme Court observed:

Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.⁴

Prospective utility competitors have also shown an interest in holding cable operators hostage with unreasonable pole attachment rates and access denials that delay plant upgrades and prevent

¹ PaPUC Comments at 4-5.

² PaPUC Comments at 3.

³ See initial comments of the Joint Cable Operators in this proceeding ("Joint Cable Operator Comments") at footnotes 11, 13, 17, and 18; *See also* Petition for Stay and Pole Attachment Complaint of Comcast of Arkansas, File No. EB-06-MD-001 (filed January 6, 2006)

⁴ *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002)

the timely deployment of broadband service.⁵ This was clearly on the mind of Congress when in 1996 it granted utilities the right to enter into competitive businesses but made access to poles mandatory for both cable and telecommunications providers: “[p]erhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory.”⁶ Accordingly, the Joint Commenters’ requested relief is necessary to insure that utilities are not able to defeat mandatory access by claiming “insufficient capacity” under 224(f)(2) and 1.1403(a) of the Commission’s rules even though capacity is readily available through traditional and fully reimbursed make-ready procedures.⁷

The comments of NextG and Virtual Hipster raise concerns about current utility pole attachment practices and their potential for abuse of bottleneck pole facilities which complement the Joint Cable Operator’s comments. NextG, a provider of additional capacity and transmit facilities for wireless operators, argues that classification of BPL will not be in the public interest unless the Commission adopts “new rules that stop the current abuses and impose powerful safeguards and deterrents against future abuses.”⁸ NextG attached comments filed in a pending pole attachment rulemaking⁹ where it documented abusive pole attachment rate practices¹⁰ and

⁵ See Joint Cable Operator Comments at p.5 and discussion at footnote 13; See also Comments of the California Cable and Telecommunications Association on The Draft Decision of Commissioner Chong, *Order Instituting Rulemaking Concerning Broadband over Power Line Deployment By Electric Utilities in California*, p. 6, California Public Utility Commission Rulemaking 05-09-006 (“In Northern San Diego County, Daniel’s Cablevision began upgrading its plant in 1991, only to be delayed, coincidentally by *the only utility now planning to provide BPL services*, for over ten years, over a dispute that was ultimately determined by the CPUC in 2002 (C. 00-09-025), *at a litigation cost of over \$300,000*”) (emphasis added).

⁶ *Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, 311 F.3d 1357, 1363 (11th Cir. 2002).

⁷ See Joint Cable Operator Comments at 1, 6, and 8.

⁸ Next G Network Comments at 2.

⁹ *Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303 (public notice rel. December 14, 2005).

¹⁰ NextG Network Comments, Attachment 1, p.8.

requested new pole regulations to address them. Virtual Hipster, a wireless broadband provider, also observed that BPL competition will give utilities additional incentives to impose unreasonable attachment conditions on competing service providers.¹¹ The experiences of both NextG and Virtual Hipster further demonstrate the need for FCC action on pole capacity to prevent anticompetitive access denials and abuse.

In comments supporting its own petition, the UPLC argued that an information service classification for BPL would promote broadband competition by giving utilities a “level playing field” to compete against cable operators and telcos.¹² It also seems apparent that utilities are eager to deploy BPL services in a lightly regulated Title I environment.¹³ While regulatory parity is a common theme in utility comments, the broadband playing field will never be level for cable operators unless they are assured of having the same access to distribution facilities that pole-owning telcos and utility broadband competitors do. Unlike electric utilities deploying BPL or telephone companies rolling out DSL,¹⁴ cable operators must rely on the protections in Section 224 and the FCC’s rules for continued access to the nation’s essential distribution facilities.¹⁵ We do not ask the FCC to delay BPL deployment, but simply to ensure that a true

¹¹ Virtual Hipster Comments at 1-2.

¹² UPLC Comments at 18.

¹³ See San Diego Gas & Electric Company Comments at 4; Progress Energy Comments at 2; Duke Energy and Cinergy Broadband Comments at 2-3.

¹⁴ Most ILECs own pole facilities either solely or jointly with local utilities and therefore do not receive the same federal pole access protection as cable operators. See *Implementation of Section 703 of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶ 49 (rel. February 6, 1998) (“ILECs generally possess [pole] access and Congress apparently determined that they do not need the benefits of Section 224”).

¹⁵ See *Alabama Cable Telecommunications Association et al. v. Alabama Power Company*, 16 FCC Rcd 12209, ¶69 (rel. May 25, 2002) (“[C]able attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of

level playing field exists and to enforce Congress's mandate of non-discriminatory and equal access to essential distribution facilities for all players.

Clarifying the meaning of "insufficient capacity" under Section 224(f)(2) in conjunction with classifying BPL as an information service ensures that the public interest will be served. Ensuring competitive access on reasonable terms will not slow BPL deployment or impose additional costs on utilities because all costs associated with rearranging lines on a pole or installing a new pole to accommodate new attachments are fully borne by the attacher requesting the rearrangement or replacement. 47 U.S.C. § 224(h). Accordingly, grant of the Joint Cable Operators' request will serve the public interest by insuring that no consumer will be deprived of the choice of competitive cable broadband services as a result of unjust or unreasonable denials of access to electric utility poles.

poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles").

For all these reasons, the Commission should grant the relief requested in the Joint Cable Operator Comments and clarify the meaning of insufficient capacity to prevent BPL providers from leveraging their monopoly of distribution facilities through unlawful denials of access.

Respectfully submitted,

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